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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

REX FRANCO FABROS,

Defendant and Appellant.

D050715

(Super. Ct. No. SCD191087)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

Following a bench trial, Rex Franco Fabros (Fabros) was convicted of committing lewd acts upon a child. (Pen. Code, § 288, subd. (a), counts 1-8);¹ lewd acts upon a child 14 or 15 years old (§§ 288, subd. (c)(1), counts 9-17); unlawful sexual intercourse with a minor more than 3 years younger than the perpetrator (§ 261.5, subd. (c), counts 18-22); forcible rape (§ 261, subd. (a)(2), count 23) and false imprisonment by violence, menace,

¹ All further statutory references are to the Penal code unless otherwise stated.

fraud and deceit (§§ 236, 237, subd. (a), count 24). As to counts 1 through 8, allegations were found true that he had sexual contact with the victim, who was under 14 years old. (§ 1203.066, subd. (a)(8).) The court sentenced Fabros to prison for a term of 31 years four months.

Fabros contends insufficient evidence supported the convictions on counts 1 through 11, and the trial court erred by restricting the psychologist's testimony under the psychotherapist-patient privilege. We affirm.

FACTUAL SUMMARY

Hillary B. was born in November 1987. At trial she testified as follows: In 1999, she moved from Florida to Chula Vista, California, where she lived with her sister Kelly and Kelly's husband Fabros. Fabros used to wake up Hillary around midnight a couple days a week to watch television shows about lions. He would lie behind her on the couch, and stroke her head.

After Hillary finished sixth grade, she attended summer school. One day, in August 2001, Fabros took her out of summer school early and told her he thought he was in love with her. When they reached home, he asked her opinion regarding his earlier comment, then he lay on top of her and kissed her. Hillary testified that starting a couple days afterwards, Fabros "would come home, and somehow — somehow we would end up in my room together, but he would always say, 'let me see you in your birthday suit.' " Hillary initially did not know what he meant. He took off her clothes, except her underwear, and caressed her arms, and told her she was beautiful.

At the end of that summer, when Hillary was 13 years old and about to start the seventh grade, Fabros put his fingers inside her vagina and penetrated her with his penis. Fabros threatened that if she told anyone about his actions, she would be sent to a foster home.

Subsequently, Fabros had sexual intercourse with Hillary "every other day" in her bedroom, his bedroom or the living room, "mostly when he was on his lunch break, or at nighttime when everybody was sleeping." Hillary felt that she was emotionally forced to do it. Fabros told her that when she turned 18 he was going to marry her. Approximately three months later, Hillary told two of her friends, Tiana and Lisa, that she thought she was in love with a married man, but she did not specify that she was referring to Fabros.

Hillary's relationship with Kelly worsened and Kelly became jealous because Fabros spoiled Hillary. He bought Hillary numerous clothes and spent more time with her than with Kelly and their children. Kelly disapproved of the tank tops Fabros had bought for Hillary, and ripped them. Hillary became upset and threatened to kill Kelly if she did it again. Fabros had to step in between them. The police were notified and Hillary spent time in juvenile hall for making the threat. Hillary also had a physical altercation with one of the Fabros's sons, and she was put on probation.

From August 2001 to January 2003, Fabros, during his lunch break, sometimes took Hillary out of school, and had sexual intercourse with her at home at least two or three times a week, except when she visited her family in Florida. Hillary testified that Kelly twice caught Fabros in Hillary's room and asked him what he was doing there. Fabros responded that he was closing the bedroom window, or that Hillary was having

nightmares. Hillary testified that one night, two of her friends, Rosa and Rocio, sneaked into her bedroom and slept on the floor. Fabros entered Hillary's bedroom and, straddling her, was kissing her on the neck and cheek when he saw the girls. He quickly left the room and was upset.

In early 2003, Hillary's school attendance was "pretty bad." Her grades were "not that good." One night, Hillary left Fabros' house and placed a note on her bed telling Fabros that if he followed her she would tell others that he had raped her.

In May 2003, Hillary was 15 years old and had a boyfriend, David A. She started resisting Fabros' advances, and told him she no longer wanted to have sex with him. Fabros continued to have sex with her through September 2003. In November 2003, the probation department and Kelly decided Hillary should go to Florida permanently. Although Hillary took all her belongings to Florida, Fabros told her he would arrange her return to California.

Fabros phoned Hillary in Florida, and without informing Kelly or Hillary's grandmother in Florida, paid for Hillary's plane ticket to San Diego. On November 26, 2003, the Florida police briefly detained Hillary at the airport because her grandmother reported her missing. Hillary told the police the Fabros's were her guardians. The police confirmed this with Fabros and released her to fly. At the San Diego airport, Fabros picked her up and took her to a hotel for approximately three nights. Fabros had sex with her each day. Fabros did not tell Kelly that Hillary was back in San Diego.

On November 29, 2003, Fabros drove Hillary to the San Diego airport for her friends to pick her up because Fabros did not want them to know he was involved in

returning her to San Diego. The following week, Hillary stayed with friends. Fabros called her often, and at first she did not tell him her whereabouts. But she eventually did because she did not have money or anyone else to take care of her. Fabros gave her money. Between December 2003 and January 2004, Fabros took Hillary to his brother's house in Lemon Grove a couple of times a week and had sex with her. During this time, Fabros did not help Hillary further her education and she did not complete the ninth grade.

In mid-January 2004, Fabros paid one thousand dollars a month for Hillary's rent at an Imperial Beach apartment. He continued to have sex with her there. After approximately two months, Hillary left the apartment to get away from Fabros. In the spring of 2004, she stayed with friends without giving Fabros the address. She would arrange to meet him elsewhere. He had sexual intercourse with her approximately two or three times a week. In May, 2004, Fabros bought her a "white gold" ring as a "promise ring." He told her to wear it on her ring finger "so that everybody would know that [she] wasn't available, so no guys would hit on [her]."

In approximately May 2004, Fabros told Hillary there was bench warrant for her arrest for failure to appear in court. Shortly afterwards, she was arrested and sent to juvenile hall. Fabros and his wife visited her there. A child protective services officer asked Hillary whether Fabros had had sexual intercourse with her, but she denied it for fear she would stay in juvenile hall or be sent to live with a foster family.

In November, 2004, Hillary was sent against her wish to Triple L Group Home in Ramona. Before going, she warned Fabros and the probation officer she would run

away. Fabros told her he would help her escape from there. The first week that she was there, Fabros telephoned her and they plotted her escape. On November 24, 2004, she escaped with Fabros, who took her immediately to a hotel where she stayed for approximately three days. Fabros had sexual intercourse with her each night and spent at least one night there with her. She became sick one day because she had stopped taking prescription medications for depression and her inability to sleep. Fabros took her to the hospital, but warned her not to use her real name because she was only 16 years old; consequently, she used a different name.

Fabros arranged for Hillary to stay with his friend, Joy Miles, for approximately two weeks. Hillary's boyfriend told Miles he suspected Fabros was having sex with Hillary. She neither admitted nor denied it to Miles, saying instead that Fabros and her boyfriend did not like each other.

In December 2004, Fabros put up Hillary in an El Cajon apartment. He had sex with her there approximately twice a week and sometimes spent the night with her. Approximately one month later, Hillary left the apartment without telling Fabros because she wanted him to stop having sex with her. But Hillary had no money and needed Fabros's assistance; therefore, she called him after approximately two weeks.

On January 24, 2005, he took her to the apartment. They argued and fought. He threatened to take her to northern California, where she would not see her family and friends again. He told her the only way for them to resolve their differences was for them to kill each other. He blocked the door with a chair, took off her clothes and forced her to have sex with him.

On March 17, 2005, Hillary and her boyfriend were at a drive-in movie, and the police arrested Hillary. As the police lead her away, she saw Fabros crouching behind a car. Hillary told the police they should arrest Fabros, not her, because Fabros had had sex with her since she was 13 years old. Hillary was sent first to juvenile hall, and approximately three weeks later to Florida.

In April, 2005, San Diego Police Detective Tu Nguyen contacted Hillary in Florida and she agreed to make pretext telephone calls to Fabros, mentioning that Fabros had had sex with her, and asking him if Kelly knew about that. Hillary reminded Fabros that he made her watch a pornographic movie, "The Lover", about an older Asian man having sex with a younger Caucasian girl. Fabros did not deny his sexual intercourse with Hillary. In May 2005, Detective Nguyen interviewed Fabros and later arrested him.

On cross-examination of Hillary, she admitted that before she told the police about Fabros, she used to have a problem with lying, and she even wrote a poem referring to herself as a liar. She admitted that from November 2003 until January 2005, she had several opportunities to tell Kelly, counselors and other professionals that Fabros had sexual intercourse with her, but she declined to do so and even denied such claims.

Kelly Fabros testified for the defense that she never saw any indication Fabros and Hillary had a sexual connection between them. Hillary and the Fabros family received counseling for Hillary's behavioral problems, which Kelly described as follows:

"[Hillary] would lie to lie. . . . there would be no reason for a lie sometimes and you would just constantly catch her in lies. There was the manipulating, doing the 'little-girl act' is what I used to call it, and violence." Kelly elaborated, "Whenever [Hillary] would

say something, you really had to check into it. And she would say, 'Look, I'll prove it by this, that' — she'd try and give you proof of her truth. . . . you couldn't just rely on what she said. I would have to check everything that she said. And it would be over silly things.

. . . there was just always lying." Kelly added that Hillary's teachers, and members of her church congregation were aware Hillary told lies.

Fabros testified and denied he had sexual intercourse with Hillary. He stated he treated her like a younger sister. He had a difficult time rearing Hillary, because of her behavioral problems. He was concerned that Hillary was being negatively influenced by her boyfriend and her other friends, who included drug users and prostitutes.

On cross-examination, Fabros testified Hillary lied compulsively and was manipulative. Although he generally denied he had sexual or amorous motives for his actions, he substantially agreed with Hillary's testimony. Specifically, in 1999, he and she would watch television shows about lions on The Discovery Channel at nighttime. When Hillary was staying at his house, he once went to her bedroom and discovered Hillary's two girlfriends were spending the night there. He brought Hillary from Florida against Kelly's wishes and without her knowing. He met Hillary at the airport, spent approximately three days with her at a hotel and took her back to the airport. He put her up in apartments in Imperial Beach and El Cajon, and took her to his brother's home in Lemon Grove.

He reported her missing to the police on December 4, 2003, but he did not tell the police he had picked her up at the airport and taken her to a hotel. Rather, he told them

she refused to leave the airport with him and she went with friends instead. He admitted that although he knew there was a bench warrant for her arrest, he did not tell the police her whereabouts. He shopped with her and bought her clothes his wife regarded as sexy. Even after his wife tore up her clothes, he bought Hilary similar clothes. He also bought Hillary a ring.

He helped Hillary escape from the Triple L Home. In Hillary's pretext calls to him, he did not deny her statements referring to his sexual interactions with her. He admitted watching the movie, "The Lovers", but claimed it was at Hillary's request. He acknowledged that in 2002 and 2003, his relationship with Hillary was stressful for Kelly who became depressed and stopped keeping up on Hillary's actions. His children exhibited odd behavior during this time. He and Kelly sought therapy and he temporarily separated from her.

DISCUSSION

I.

Fabros contends insufficient evidence supported the charges in counts 1 and 2 that Fabros committed lewd acts with Hillary in August 2001, and therefore the convictions on counts 3 through 11 — relating to such acts committed September 1, 2001 through December 31, 2002 — also were unsupported by substantial evidence.

In reviewing a challenge to the sufficiency of the evidence, we examine "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence" from which "a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

We are mindful that it " ' "is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "[I]t is not within our province to reweigh the evidence or redetermine issues of credibility." (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412.) "The testimony of one witness, if believed, may be sufficient to prove any fact." (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508-1509, citing Evid. Code, § 411.)

The California Supreme Court decision in *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*) is controlling. A victim's testimony is sufficient when it specifies the type and frequency of the conduct involved and that it occurred within the limitations period. (*Jones, supra*, at pp. 315-316.) The victim's inability to specify the exact time, place, or circumstance of the lewd acts do not render the testimony too insubstantial to support a conviction. "[P]articular details surrounding a child molestation charge are not elements of the offense and are unnecessary to support a conviction." (*Id.* at p. 315.) "[E]ven generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." (*Id.* at p. 314.)

Hillary's testimony was sufficient to sustain the counts 1 through 11 convictions. Even if, as Fabros contends, she did not attend summer school, she identified the time frame that Fabros's lewd acts started in other generic ways, saying they occurred between her sixth and seventh grades, in August 2001, and approximately two weeks before fall classes resumed. Hillary also described with sufficient specificity the kinds of acts

Fabros committed, and the frequency of those acts, thus assuring the acts were committed within the applicable limitation period. Here, "Additional details regarding the time . . . of the various assaults assist[ed] in assessing the credibility or substantiality of the victims testimony, but [were] not essential to sustain a conviction." (*Jones, supra*, 51 Cal.3d at p. 316.)

We are mindful that "Child molestation cases frequently involve difficult, even paradoxical proof problems. A young victim . . . assertedly molested over a substantial period by a parent or adult residing in [her] home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Jones, supra*, 51 Cal.3d at p. 305.) We note that the trial court observed the witnesses' demeanor and ruled, "First, I found the testimony of Hillary . . . to be very credible. Secondary, I found the testimony of Rex Fabros to be ambiguous, equivocal, and significantly lacking in credibility." Moreover, Fabros's own testimony corroborated Hillary's on many key points and provided circumstantial evidence of his guilt.

We considered with this appeal a writ petition filed by Fabros, D052661. In the writ petition, Fabros contends he received ineffective assistance of counsel because, during trial, Kelly Fabros informed trial counsel's office that Hillary was no longer eligible to attend summer school in 2001 because she had graduated from the sixth grade. Accordingly, if trial counsel had explored this matter, he would have discovered that Hillary did not attend summer school anywhere in 2001. Fabros claims prejudice because, "The evidence of Hillary's non-attendance at summer school was objective

evidence which disproved a fact which was foundational to eleven of the counts. Had that evidence been discovered and adduced, it would have cast the respective credibility of [Fabros], Mrs. Fabros and Hillary in a much different light."

A petitioner claiming ineffective assistance of counsel must affirmatively prove prejudice. We apply a deferential level of scrutiny to trial counsel's performance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; 217.) The familiar two-prong test for claims of ineffective assistance of counsel, outlined in *Strickland v. Washington* (1984) 466 U.S. 668, 686-687, requires a defendant to demonstrate the attorney's deficient performance, and resulting prejudice. If the second prong is not established, the reviewing court should reject the claim without analyzing the first prong. (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367.) As we explained above, there was sufficient evidence of Fabros's guilt. Even if Hillary was mistaken about the specific date that Fabros started to have sexual intercourse with her, it does not follow that she was untruthful about the fact he did so and the frequency of such conduct. As CALJIC No. 2.21.1 instructs, "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily meant that a witness should be discredited." If trial counsel had adduced evidence Hillary was not in summer school in 2001, it does not prove that Hillary was wrong when she testified Fabros had sex with her in the weeks before she started the seventh grade. Fabros has failed to demonstrate prejudice. The writ petition will be denied by separate order.

II.

Dr. Christie Haralson, a psychologist, had joint meetings with Kelly and Fabros. Fabros contends Hillary's communications in that group context were not confidential as to Kelly and Fabros, thus the psychiatrist-patient privilege should not have barred them from using at trial information Hillary disclosed in those meetings. Accordingly, the trial court erred in restricting Dr. Haralson's testimony. We review the trial court's ruling for an abuse of discretion. (*In re Kevin F.* (1989) 213 Cal.App.3d 178, 183.)

Evidence Code section 1014 states the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by the holder of the privilege or the psychotherapist at the time of the confidential communication. "[E]vidence Code section 1012 plainly indicates that communications made by patients to persons who are present to further the interests of the patient comes within the privilege. 'Group therapy' is designed to provide comfort and revelation to the patient who shares similar experiences and/or difficulties with other like persons within the group. The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment. Communications such as these, when made in confidence, should not operate to destroy the privilege." (*Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 527 (*Farrell*).)

Dr. Haralson testified in a hearing pursuant to Evidence Code section 402 that she worked with the Psychiatric Emergency Response Team (PERT). This program partners a licensed mental health clinician with a police officer to respond to radio calls relating to

mentally ill individuals. The police officer's primary duty is to provide security to the clinician during the mental status exam and follow-up exam. The clinician's diagnosis and files are confidential and not shared with the police.

From approximately September 2001 to November 2003, Dr. Haralson had several interactions with Hillary, both alone and with the Fabros family. Dr. Haralson formulated a diagnosis for Hillary, and kept Hillary's records confidential. Dr. Haralson kept separate confidential files for her contacts with Kelly. Dr. Haralson disclosed to the juvenile court confidential information regarding Hillary, and complied with the court's order stating Hillary and her guardians must participate in counseling and "the therapist is to provide diagnostic and progress reports to the Probation Officer whenever requested."

The trial court, following arguments and its in camera review of the PERT records, ruled that a confidential psychotherapist-patient relationship existed between Dr. Haralson and Hillary. Moreover, counsel's access to the subpoenaed PERT documents did not overcome the privilege. The trial court instructed Dr. Haralson she could testify regarding whether "she reached the opinion that Hillary B. suffered from these diagnoses that appear in her reports, without the specifics as to how [Dr. Haralson] reached those diagnoses." The trial court added, "[I]t appears that much of what [defense counsel] was presenting by way of relevant evidence as to Dr. Haralson is, in fact, testimony or evidence that could be presented by Mrs. Fabros, Mr. Fabros, should he decide to take the stand, or others, and that it's really not relevant as to what was said or not said by Hillary B. to Dr. Haralson, other than what the ultimate diagnosis was."

Dr. Haralson testified at trial that she concurred in another clinician's diagnosis that Hillary suffered from both reactive attachment disorder and oppositional defiant disorder. Consequently, Hillary had "significant behavioral problems," including threats to Kelly, for which Hillary was sent to juvenile hall. Fabros and Kelly had difficulty controlling her behavior. Following *Farrell, supra*, 203 Cal.App.3d 521, we conclude the joint therapy with Hillary and the Fabros family was for the benefit of all the parties, and Hillary's right to assert the privilege was not destroyed by the Fabros's presence during therapy.

We reject Fabros' contention Hillary waived the privilege because Dr. Haralson discussed Hillary's situation with her police officer partner and disclosed the PERT records to the juvenile court. This court, in *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083 (*Trolley*), summarized the California Supreme Court's rulings on the psychiatrist-patient privilege. The purpose of the privilege is to protect the patient's right to privacy and promote the psychotherapeutic relationship. (*Id.* at p. 1091, quoting *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 448 (*Menendez*).) This privilege also governs any other third person privy to a confidential relationship. (*Trolley, supra*, at p. 1091.)

The privilege may be waived when the patient voluntarily discloses confidential information, or the patient tenders her mental state as an issue. Nonetheless, "a patient retains the more general right to privacy protected by the state and federal Constitutions. [Citation.] Thus, any waiver must be narrowly construed and limited to matters 'as to which, based upon [the patient's] disclosures, it can reasonably be said [the patient] no

longer retains a privacy interest.' " (*Trolley, supra*, 87 Cal.App.4th at p. 1092.) The psychotherapist's comments that the third-party PERT police officer heard are protected by the privilege. Evidence Code, section 1012's "privilege to prevent" disclosure clause "effectively repudiates the old 'eavesdropper rule,' under which the privilege is defeated whenever any 'outside' 'third person — eavesdropper, finder or interceptor — overhears or otherwise receives the confidential communication.' " (*Menendez, supra*, 3 Cal.4th at p. 448.)

There was no waiver of the privilege when the PERT records were disclosed to the juvenile court and defense counsel pursuant to subpoenas. "Indeed, Evidence Code section 1012 itself permits the disclosure of a confidential communication between patient and psychotherapist to 'those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted' In our view, this would include the juvenile court." (*In re. Pedro M.* (2000) 81 Cal.App.4th 550, 554.) "[T]herapy has a dual purpose — treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned decisions regarding the child's welfare can be made." (*In re Kristine W.* (2001) 94 Cal.App.4th 521, 527.) Dr. Haralson disclosed the information to assist the court in making reasoned decisions about Hillary's welfare. We conclude the trial court did not abuse its discretion in upholding Dr. Haralson's claim of psychiatrist-patient privilege.

Fabros contends he was prejudiced by the exclusion of Dr. Haralson's notes from evidence and "no amount of testimony by either Kelly or Appellant could be an adequate substitute for [Dr. Haralson's] unimpeachable observations." On this record, given

Kelly's and Fabros's attacks on Hillary's credibility described above, there was no prejudice because it is not reasonably probable that the trial judge would have reached a different outcome if Dr. Haralson's notes or testimony regarding Hillary's confidential conversations had been admitted into evidence.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.